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August 31, 2000

EX PARTE OR LATE FILED

VIA COURIER

Magalie Roman Salas, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**RE:** Written *Ex Parte* Submission: *In the Matter of Compatibility  
Between Cable Systems and Consumer Electronics Equipment,*  
PP Docket No. 00-67

Dear Secretary Salas:

The attached comments are being submitted on behalf of the Consumer Electronics Association ("CEA"). The comments serve to clarify to the Commission that it has not (and should not) established a "link" between copy protection and conditional access, such that copy protection requirements could be included in the DFAST technology license the cable industry requires for consumer electronics manufacturers to attach their POD (point-of-deployment)-capable, OpenCable-compliant cable systems in a way that would not violate the navigation devices rules, in particular 47 C.F.R. § 76.1204(c). The attached comments make clear that Section 76.1204(c) prohibits licensors from imposing requirements on consumer electronics manufacturers that are unrelated to protection against threats to system security and conditional access, and that copy protection clearly is not part of system security and conditional access under the Communications Act, as amended, the Commission's Rules, and the Commission's navigation devices orders.

A copy of this letter and the attached comments are being submitted this date to the following individuals at the FCC:

Kathryn Brown and Karen Edward Onyeije, *Office of Chairman William Kennard*  
Mark Schneider, *Office of Commissioner Susan Ness*  
Helgi Walker, *Office of Commissioner Harold Furchtgott-Roth*  
Paul Jackson, *Office of Commissioner Michael Powell*  
William Friedman, *Office of Commissioner Gloria Tristani*  
Robert Pepper, Jonathan Levy, and Amy Nathan, *Office of Plans and Policy*  
Dale Hatfield, *Office of Engineering & Technology*  
William Johnson, Deborah Klein, and Steven Broeckaert, *Cable Services Bureau*

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Magalie Roman Salas  
August 30, 2000  
Page 2

Pursuant to Section 1.1206 of the Commission's Rules, an original and a copy of this letter with the attached comments are being filed with your office for inclusion in the public record in the above-referenced proceeding. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Bartolome", followed by a long horizontal flourish line.

Benigno E. Bartolome, Jr.

*Counsel for the Consumer Electronics Association*

Attachment (Written *Ex Parte* Presentation of CEA)

**RE:** *In the Matter of Compatibility Between Cable Systems and  
Consumer Electronics Equipment,*  
PP Docket No. 00-67

**EX PARTE COMMENTS OF  
THE CONSUMER ELECTRONICS ASSOCIATION**

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The Consumer Electronics Association (“CEA”) hereby submits the following *ex parte* comments for inclusion in the public record in the above-captioned proceeding.<sup>1</sup> CEA, the principal trade association of the consumer technology industry, is an active participant in this proceeding, having submitted comments and reply comments.<sup>2</sup> By this submission, CEA hopes to make clear to the Commission that it has not, in fact, established a “link” between copy protection and conditional access, such that copy protection requirements could be included in the DFAST technology license the cable industry requires for consumer electronics (“CE”) manufacturers to attach their equipment to POD (Point-of-Deployment)-capable, OpenCable-compliant cable systems in a way that would not violate the navigation devices rules, in particular Section 76.1204(c).<sup>3</sup> As further explained below, Section 76.1204(c) makes clear that licensors are specifically prohibited from imposing requirements unrelated to protection against threats to system security and conditional access, and that copy protection clearly is not part of

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<sup>1</sup> See *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Notice of Proposed Rulemaking, FCC 00-137 (rel. April 14, 2000) (“NPRM”).

<sup>2</sup> See Comments of the Consumer Electronics Association in PP Docket No. 00-67 (filed May 24, 2000); Reply Comments of the Consumer Electronics Association in PP Docket No. 00-67 (filed June 8, 2000).

<sup>3</sup> See 47 C.F.R. § 76.1204(c).

system security and conditional access under the Communications Act, as amended, the Commission's Rules, and the Commission's navigation devices orders.<sup>4</sup>

**I. The Injection of Copy Protection Requirements in DFAST Licensing Will Necessarily Violate the Commission's Navigation Devices Rules.**

Any action by the Commission on copy protection issues in this docket should be consistent with the Commission's navigation devices rules, especially Section 76.1204(c), which states:

No multichannel video programming distributor shall by contract, agreement, patent, intellectual property right or otherwise preclude the addition of features or functions to the equipment made available pursuant to this section that are not designed, intended or function to defeat the conditional access controls of such devices or to provide unauthorized access to service.<sup>5</sup>

As the language of this rule evinces, cable security and content copy protection are not synonymous in all aspects. There is a fundamental difference between conditional access and copy protection. The former controls the general availability to the subscriber to desired programming without defining any particular allowed use. The latter details how, and perhaps when, the subscriber can use the programming. Because copy protection and conditional access are different, multichannel video programming distributors ("MVPDs") necessarily will violate Section 76.1204(c) if they require manufacturers to adopt copy protection measures as a condition to connect their equipment to cable systems through their POD interface. Section

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<sup>4</sup> See *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775 (1998) ("Navigation Devices Report and Order"); Order on Reconsideration, 14 FCC Rcd 7596 (1999) ("Navigation Devices Order on Reconsideration"). See also *General Instrument v. FCC*, No. 98-1423 (D.C. Cir. June 6, 2000) (denying petitions for review of the FCC's navigation devices orders).

<sup>5</sup> 47 C.F.R. § 76.1204(c).

76.1204(c) thus prohibits CableLabs from imposing requirements on host device manufacturers that are unrelated to protection against threats to system security and conditional access.

The Commission must remain steadfast in its efforts to curb overreaching efforts by cable, motion picture, and other industry interests to force unlawful and unreasonable copy protection requirements into licensing agreements covering conditional access arrangements. Failure to do so would effectively relinquish consumer control over viewing and lawful home recording rights, and it would render competitive navigation devices inferior to those offered by MVPDs, a result which would be contrary to the objectives of Section 629 of the Act. As the Commission has previously concluded, separation of security is necessary in order to enhance the commercial availability of navigation devices equipment. For similar reasons, the terms of a technology license must not work to forbid the inclusion of other technology in competitive devices.

The Commission, in the *NPRM* in this docket, appropriately recognizes that the navigation devices rules place limits on the licensing terms that can be imposed: “our navigation devices rules do place some limits on the licensing terms that MVPDs can impose on manufacturers of navigation devices.”<sup>6</sup> In making this statement, the Commission recognized that any failure to certify CE devices on a basis other than facilitating unauthorized service or defeating conditional access would be a violation not only of Section 76.1204)(c), but also of Section 76.1202, which states:

No multichannel video programming distributor shall by contract, agreement, patent right, intellectual property right or otherwise prevent navigation devices that do not perform conditional access or security functions from being made available to subscribers from retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator, subject to § 76.1209.<sup>7</sup>

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<sup>6</sup> *NPRM*, at ¶ 20.

<sup>7</sup> 47 C.F.R. § 76.1202 (cited in *NPRM*, at n.49).

Additional navigation devices rules also indicate that the licensing terms that MVPDs can impose on CE manufacturers relate only to conditional access and system security, and not copy protection. Section 76.1201 states that the right to make navigation devices available includes the right to attach or use them on the cable system, “except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service.”<sup>8</sup> The Commission, in its discussion of the foregoing rules, clarified that “[t]hese standards shall be used only to prevent attachment of navigation devices that raises reasonable and legitimate concerns of electronic or physical harm or theft of service, and not as a means to unreasonably restrict the use of navigation devices obtained from a source other than the MVPD.”<sup>9</sup> The Commission clearly has not construed its navigation devices rules to mean that copy protection requirements are in any way “linked” or related to protection against threats to system security and conditional access.

As Circuit City, for example, observed, “[t]he entire purpose of the Commission’s regulations, and the requirement of a national security interface, is to bifurcate Navigation Device function, so that POD modules provide authorization for, and enable, receipt of service, and host CE and IT devices cannot and do not do so.”<sup>10</sup> Thus, Circuit City continues, “if copy protection functions performed by OpenCable host devices were to be classified as ‘conditional

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<sup>8</sup> 47 C.F.R. § 76.1201.

<sup>9</sup> *Navigation Devices Report and Order*, at ¶ 38 (emphasis added).

<sup>10</sup> Comments of Circuit City Stores, Inc. in PP Docket No. 00-67, at 18 (filed May 24, 2000).

access' or 'security,' the OpenCable specifications itself would be contrary to Commission regulations.”<sup>11</sup> The licensing of DFAST technology simply is not an appropriate vehicle to apply broad copyright policy. The Commission must not allow cable interests to assert control over navigation device manufacturers and, ultimately, consumer choice through DFAST licensing. The terms of a DFAST technology license must not precondition product certification and the right to attach on requirements unrelated to system security or conditional access, because they are not authorized under statute or Commission rules and policies.

**II. There Is No Statutory Basis For Equating Copy Protection With Conditional Access or System Security.**

Copy protection clearly is not part of system security or conditional access. This view apparently is widely recognized and is supported by the record in this docket. In its initial comments, Thomson Consumer Electronic illustrated this distinction between copy protection and conditional access by pointing out that Congress, for example, drew a bright line between access and copy protection in the Digital Millennium Copyright Act of 1998, by stating that “[w]hile Section 1201 of the Act prohibits circumventing a technological measure in order to gain unauthorized access, it does not prohibit circumventing a measure that prevents copying.”<sup>12</sup> Further, the Commission, in its *Navigation Devices Report and Order*, also appears to recognize that copy protection is not the same as conditional access or system security, stating that “[c]opy protection systems and devices that impose a limited measure of data encryption control over the types of devices that may record (or receive) video content [will] not be subject to separation

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<sup>11</sup> *Id.*

<sup>12</sup> See Comments of Thomson Consumer Electronics, Inc. in PP Docket 00-67, at 8 (filed in PP Docket No. 00-67) (citing Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998)).

requirement.”<sup>13</sup> Accordingly, while DFAST licensing agreements may include security and conditional access obligations, they cannot, and must not, impose any copy protection requirements.

In addition to Section 629 of the Act, there exists only one other provision – *i.e.*, Section 633 – that concerns cable theft and security, but it also does not apply to copy protection concerns. Indeed, the Commission has never construed Section 633 of the Act, 47 U.S.C. § 533, to indicate that copy protection is in any way related to conditional access or system security. In the *Navigation Devices Reconsideration Order*, the Commission, in fact, declined to define the scope of Section 633 or related theft of service provisions in the copyright context. The Commission stated:

Section 76.1209 states that “Nothing in this subpart shall be construed to authorize or justify any use, manufacture, or importation of equipment that would violate 47 U.S.C. § 553 or any other provision of law intended to preclude the unauthorized reception of multichannel video programming service.” Time Warner seeks clarification of the term “theft of service” as that term is referenced in Section 76.1209. It argues that the term should include any device that can be used to defeat or assist in defeating copy protection techniques employed by program producers or copyright holders. In opposition, parties argue that Time Warner’s proposal is beyond the scope of this proceeding, requiring the FCC to police unrelated issue of copy control.

To the extent Time Warner is asking us to redefine more expansively what type of “use, manufacture, or importation” of equipment would violate Section 553 and other related provisions of the law, we believe that request is beyond the present scope and record of this proceeding. Section 629 requires that the Commission not impede the legal rights of MVPD to prevent theft of service. Section 633 (47 U.S.C. § 553) of the Act and other parallel laws of this type provide penalties for intercepting or receiving or assisting in intercepting or receiving any communications service offered over a cable system unless specifically authorized to do so. Our intent is that Section 76.1209 be interpreted in a manner consistent with these prohibitions. We express no opinion here as to the scope of Section 633 or related theft of service provisions in the copy protection context.<sup>14</sup>

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<sup>13</sup> *Navigation Devices Report and Order*, at ¶ 63.

<sup>14</sup> *Navigation Devices Order on Reconsideration*, at ¶¶ 52-53 (emphasis added).

### **III. Conclusion**

As the foregoing discussion establishes, the Commission has not developed a “link” between copy protection to conditional access and system security, and nor has the Communications Act authorized the Commission to establish such a relationship. It would be contrary to the Communications Act and the Commission’s navigation devices rules for the Commission to now side with cable and other interests possessing similar views on this issue of copy protection. Only if the purpose of the CE device feature or function is to defeat conditional access controls or to provide unauthorized access to service may MVPDs lawfully constrain such devices by license. Copy protection concerns, however, clearly are not part of system security and conditional access under the Communications Act or the Commission’s rules. Therefore, copy protection requirements cannot be included in the DFAST technology license the cable industry requires for CE manufacturers to attach their equipment to POD-capable, OpenCable-compliant systems without violating the Commission’s navigation devices rules.